ORIGINAL

No. 90-5744

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RICHARD L. CHAPMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in determining the weight of lysergic acid diethylamide (LSD) for sentencing purposes, the court correctly considered the combined weight of the LSD and the blotter paper used as a carrier medium for the drug.

2. Whether considering the combined weight of the LSD and the blotter paper used as a carrier medium for the drug for sentencing purposes violates due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-25A) is reported at 908 F.2d 1312. The memorandum opinion of the district court (Pet. App. 26A-31A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1990. The petition for a writ of certiorari was filed on September 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, petitioners were convicted of distributing lysergic acid diethylamide (LSD), in violation of 21 U.S.C. 841(a)(1). Petitioner Chapman was sentenced to a term of 96 months' imprisonment; petitioner Schoenecker was sentenced to a term of 63 months' imprisonment; and petitioner Brumm was sentenced to a term of 60 months' imprisonment. The en banc court of appeals affirmed.

1. The facts are not in dispute. Petitioners were convicted of selling ten sheets (1,000 doses) of paper impregnated with LSD. The weight of the LSD-imbedded paper totalled 5.7 grams; however, it was stipulated that the weight of pure LDS from which the paper was prepared was less than one gram. Pet. App. 32A. In accordance with the directive in United States Sentencing Comm'n, Guidelines Manual § 2D1.1 Drug Quantity Table n.* (1990), that "the entire amount of the mixture or compound" that "contains any detectable amount of a controlled substance * * * shall be considered in measuring the quantity" of the drug involved, the district court calculated the sentencing range for petitioners' offense in light of the 5.7-gram combined weight of the LSD and the medium paper.

Because more than one gram of LSD was involved, 21 U.S.C. 841(b)(1)(B)(v) required the imposition of a mandatory minimum penalty of five years' imprisonment. In addition, because more than four but less than seven grams of LSD was involved, petitioners' base offense level under the Sentencing Guidelines was

placed at level 28. Had the weight of the pure LSD alone been considered, petitioners would not have been liable to a mandatory minimum sentence and their base offense level under the Guidelines would have been at least four levels lower.

The government thereafter filed a motion under Guidelines § 5K1.1 allowing the district court to depart below the indicated Guidelines range because of petitioners' substantial cooperation; however, the government refused to file a motion under 18 U.S.C. 3553(e) allowing the district court to sentence below the mandatory minimum imposed by statute. The district court then sentenced petitioners to terms of imprisonment that were below the Guidelines range, but at or above the statutory mandatory minimum.

2. A divided court of appeals, sitting en banc, affirmed petitioners' sentences. Pet. App. 1A-25A. As the en banc majority noted, both the federal drug statutes and the Sentencing Guidelines provide an escalating range of punishments for drug offenses based on the weight of any "mixture or substance containing a detectable amount" of a controlled substance. Id. at 2A, 6A. In light of this unambiguous language, the majority found that "[i]t is not possible * * * to make the penalty turn on the net weight of the drug rather than the gross weight of carrier and drug." Id. at 4A. Thus, in accord with the conclusion reached by other courts of appeals considering the same issue, the en banc majority held that LSD carrier mediums -- including blotter paper

-- constitute "mixture[s] or substance[s] containing a detectable amount" of the drug and therefore must be included in calculating the drug's weight. Id. at 5A, 6A.

As the en banc majority further stated, this scheme that "make[s] the sentence increase with quantity" was "a rational way to proceed" and, hence, was constitutional. Pet. App. 9A. Nor was a different conclusion required with regard to this sentencing scheme when applied to blotter paper that had been infused with LSD. First, as the majority explained, because the use of blotter paper was an ingredient that made LSD easier to transport, conceal, and sell, it was rational for Congress and the Sentencing Commission to include its weight as part of the "mixture or substance" containing LSD. Id. at 11A. Second, because blotter paper was the carrier medium used in virtually all cases involving LSD, it was rational for Congress and the Sentencing Commission to address the statutes and the Sentencing Guidelines "to the main cases rather than the exceptions." Id. at 11A-12A. Finally, the legislative decision to include the weight of the blotter paper was rational since it would be costly and technologically difficult to extract and accurately weigh the amount of LSD contained in the blotter paper. Id. at 12A. In short, as the majority noted, petitioners selected the lightest and most common carrier medium available for distributing their LSD; they were therefore "in no position to complain" that the statute or the Sentencing Guidelines were unconstitutional as applied to them. Id. at 12A.

Five judges dissented. In their view, Congress did not intend that LSD carrier mediums, such as blotter paper, should be considered a "mixture or substance" for purposes of determining the weight of LSD for sentencing purposes. Pet. App. 14A-16A. Even if Congress intended that the weight of the carrier medium be included in calculating the weight of LSD, however, the dissenters believed that such a sentencing scheme would offend due process principles "since a difference in sentence based solely on the difference in the weight of an inert ingredient is not rationally related to the government's legitimate goal of eliminating the serious drug problem in this country." Id. at 17A.

ARGUMENT

Relying principally on the dissent below and on the decision in United States v. Healy, 729 F. Supp. 140 (D.D.C. 1990), appeal pending, petitioners contend that the sentencing judge erred in calculating the sentencing range for their conduct based upon the combined weight of the LSD and the blotter paper used as a carrier medium. Pet. 10-26. Petitioners argue that such a result is contrary to the intended meaning of the statute and, in any event, would be unconstitutionally arbitrary even if it were intended. Petitioners' claim, however, is contrary to the plain language of the Sentencing Guidelines and to the plain language of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, from which the applicable Guideline provision is drawn. Moreover, petitioners' claim has been rejected by every court of appeals (six in all) that has considered this question. See United States v.

Larsen, 904 F.2d 562 (10th Cir. 1990), petition for cert. pending, No. 90-5509; United States v. Elrod, 898 F.2d 60 (6th Cir. 1990); United States v. Bishop, 894 F.2d 981, 985-987 (8th Cir. 1990); United States v. Daly, 883 F.2d 313, 316-318 (4th Cir. 1989), cert. denied, 110 S. Ct. 2622 (1990); United States v. Taylor, 868 F.2d 125, 127-128 (5th Cir. 1989). Accord United States v. Marshall, 706 F. Supp. 650 (C.D. Ill. 1989), aff'd, 908 F.2d 1312 (7th Cir. 1990) (en banc) (decision below); United States v. Bishop, 704 F. Supp. 910 (N.D. Iowa 1989), aff'd, 894 F.2d 981 (8th Cir. 1990). This Court recently declined to review the same claim in Daly v. United States, certiorari denied, 110 S.Ct. 2622 (1990). No different result is warranted here.[1/]

In enacting the Anti-Drug Abuse Act of 1986, Congress provided a range of escalating penalties for persons committing offenses involving escalating weights of any "mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)." 21 U.S.C. 841(b)(1)(A)(v) & (B)(v). That formulation amended the predecessor statute, which imposed penalties based only on the weight of the LSD itself. 21 U.S.C. 841(b)(1)(A)(iv) (Supp. III 1982). The 1986 amendment therefore authorized sentencing courts to take into account the weight of any carrier medium when calculating the appropriate sentence for an LSD-related offense. See United States v. McGeehan, 824 F.2d 677, 681 (8th Cir. 1987),

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[1/] We note that the same issue is pending before the Court in Follett v. United States, No. 90-590 (filed Oct. 3, 1990), Bolton v. United States, No. 90-5624 (filed Sept.4, 1990), and Larsen v. United States, No. 90-5509 (filed Aug. 20, 1990).

cert. denied, 484 U.S. 1061 (1988). "This [1986] amendment demonstrate[d] that Congress was aware of the differences between LSD and LSD combined with a carrier substance," ibid. -- a difference that was especially apparent since, in enacting the 1986 amendments, Congress retained separate penalty ranges for offenses involving pure amounts of PCP and offenses involving "a mixture or substance containing a detectable amount of * * * PCP." 21 U.S.C. 841(b)(1)(A)(iv) and (B)(iv).[2/]

The Sentencing Commission used the same formulation in specifying the various offense levels under the Drug Quantity Table. As the Guidelines provide: "The scale amounts for all

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[2/] The House Judiciary Committee explained the rationale for Congress's decision to change the method by which most controlled substances were weighed for sentencing purposes from the pure weight of the controlled substance to the total weight of any "mixture or substance" containing a detectable amount of a proscribed drug:

> After consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. The Committee's statement of quantities is of mixtures, compounds or preparations that contain a detectable amount of the drug -- these are not necessarily quantities of pure substance. One result of this market-oriented approach is that the Committee has not generally related these quantities to the number of doses of the drug that might be present in a given sample. The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain.

H.R. Rep. No. 845, 99th Cong., 2d Sess. Pt. 1, at 11-12 (1986).

controlled substances refer to the total weight of the controlled substance. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity." Guidelines § 2D1.1(a)(3) Drug Quantity Table p. 2.39 n.* (Oct. 1987).[3/] See also id. p. 2.47 Application Note No. 10 ("The Commission has used the sentences provided in, and the equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences").[4/]

[3/] The reference in the footnote to a "mixture of a compound" appears to be a typographical error in view of the Commission's use of the phrase "mixture or compound" in the following clause of the footnote (emphasis added). This is especially true since the Anti-Drug Abuse Act, on which the Guideline provision is modeled, is framed in the disjunctive.

[4/] Subsequent clarifying amendments to the Sentencing Guidelines are to the same effect. Thus, the footnote now accompanying § 2D1.1's Drug Quantity Table states:

> Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the higher offense level. In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined for the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater.

Guidelines § 2D1.1 Drug Quantity Table p. 2.47 n.* (Nov. 1, 1990). See also id. p. 2.48 Application Note No. 1 ("'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. § 841").

There is "no ambiguity" in the language of the statute or the Guideline. United States v. Taylor, 868 F.2d at 127.[5/] As the Fourth Circuit correctly recognized in United States v. Daly, 883 F.2d at 317, "determining sentences on the basis of the aggregate weight of the drug itself and the 'carrier medium' clearly comports with the 'plain language' of the Anti-Drug Abuse Act itself and § 2D1.1 of the Guidelines, which expressly adopts that statute's 'mixture or substance' formulation as the benchmark for most drug quantity determinations." With respect to LSD-related offenses, blotter paper infused with LSD clearly meets the definitional formulation since the paper unquestionably constitutes "a substance," i.e., "a distinguishable kind of physical matter," that contains a "detectable amount" of LSD. See United States v. Bishop, 894 F.2d at 985 (citation omitted).

Moreover, treating LSD mediums in such a manner is consistent with the manner in which carrier mediums and cutting agents for other controlled substances are treated. "Drugs are rarely taken

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[5/] Petitioners suggest that the rule of lenity should be applied since it is unclear whether a carrier medium is a "substance" containing a detectable amount of LSD. But the rule of lenity is a tie-breaker. It comes into play only when a criminal statute remains ambiguous after its text, purpose, and legislative history are considered; it neither allows the infusion of ambiguity where none exists nor entails a preference for treating wrongdoers leniently. See, e.g., Russello v. United States, 464 U.S. 16, 29 (1983); Albernaz v. United States, 450 U.S. 333, 342-343 (1981). Here, as every court of appeals to address this question has held, the language of the statute and the Sentencing Guidelines plainly directs the inclusion of the weight of any carrier medium that contains a detectable amount of LSD, and the legislative history of the statute does not undermine that conclusion in any way. There is no occasion to resort to the rule of lenity in such circumstances.

in undiluted form"; instead, "[t]he active agent is combined with inactive ones." United States v. Rose, 881 F.2d 386, 388 (7th Cir. 1989). LSD is no exception. As has been noted, "[t]he pure chemical compound of LSD is extremely potent -- far too potent to be of any use to those who would ingest it. It is therefore necessary to dilute the solid LSD and convert it into an easily ingestible form." United States v. Bishop, 894 F.2d at 985 (quoting United States v. Marshall, 706 F. Supp. at 652). Thus, to be ingested, tiny amounts of LSD must be infused onto a carrier medium -- blotter paper in the vast majority of instances, Pet. App. 4A-5A -- which is then ingested along with the drug. See United States v. Bishop, 894 F.2d at 985; United States v. Rose, 881 F.2d at 388. See also Pet. App. 7A-8A (because "the LSD solidifies inside the paper rather than on it[,] * * * [o]rdinary parlance calls the paper containing tiny crystals of LSD a mixture" since "[y]ou cannot pick a grain of LSD off the surface of the paper"). Hence, "LSD 'carriers' serve precisely the same function as the more familiar 'cutting agents' which are typically used with other drugs -- and which are to be counted * * * in determination of sentences that are inherently dependent on the 'quantities of drugs involved.'" United States v. Daly, 883 F.2d at 318. Since Congress certainly recognized that a carrier medium "serves the purpose of making the LSD ready for retail sale and ingestion," it "intended the weight of the carrier to be included" in calculating the weight of any "mixture or substance" containing a detectable

amount of LSD. United States v. Bishop, 894 F.2d at 985; see also United States v. Elrod, 898 F.2d at 62.

2. Petitioners seek to avoid the plain language of the statute by arguing that it is arbitrary and irrational to include the weight of the carrier medium in calculating the weight of a substance containing a detectable amount of LSD because the weight of the substance -- and, hence, the indicated penalty range -- will vary greatly depending on the weight of the carrier medium. Since carrier mediums are an indispensable ingredient in the retail sale of LSD, it was, as the en banc majority recognized, hardly irrational for Congress and the Sentencing Commission "to design a schedule of penalties based on that tool of the trade." Pet. App. 11A. Moreover, it is the offender who selects the carrier medium that will affect the potential length of his sentence, with full warning as to what those penalties might be. Id. at 12A. In any event, "[a] lighter carrier than paper * * * is hard to imagine." United States v. Rose, 881 F.2d at 388. Nor is it easy to imagine a more common carrier medium. See Pet. App. 9A, 11A-12A.[5/] Thus, petitioners "are in no position to complain" that the statute and the Guidelines are unconstitutional as applied to them,

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[5/] As the en banc majority stated:

> [Petitioners'] arguments [see Pet. 23-24] are not so much about the sentences handed out for LSD in blotter paper as they are objections to the possibility that other persons will receive sentences much too long (LSD in orange juice) or too short ([LSD] in pure form). But these are only possibilities, which have nothing to do with these sentences. [Petitioners'] sentences bear rational relations to their offenses.

simply because higher penalties might be imposed on potential dı traffickers who might select heavier and less common carrie. mediums. Pet. App. 12A.

Because of its extremely high potency and dangerous effects, Congress in enacting the controlled substance statute and the Sentencing Commission in promulgating the Guidelines assigned severe penalty ranges for offenses involving relatively small amounts of LSD. That determination was not irrational. The substance in this case, made from much less than one gram of pure LSD, was sufficient to provide 1,000 dosage units of LSD. In short, petitioners were precisely the kind of significant LSD traffickers that both the statute and the Sentencing Guidelines sought to punish as severely as offenders who traffic in substantial quantities of heroin, cocaine, or other dangerous drugs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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October Term, 1990

RICHARD L. CHAPMAN, JOHN M. SCHOENECKER, and PATRICK BRUMM,

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Respondent.

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioners, Richard L. Chapman, John M. Schoenecker, and Patrick Brumm, ask leave to file the accompanying petition for writ of certiorari, without prepayment of costs and to proceed *in forma pauperis*. No affidavit is attached, inasmuch as the U.S. District Court and the U.S. Court of Appeals for the Seventh Circuit appointed each counsel designated below for the petitioners under the Criminal Justice Act of 1964.

Dated: September 11, 1990.

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FOR:

P. Scott Hassett
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CERTIFICATE OF SERVICE

I certify that I am the Attorney for petitioner Richard L. Chapman, and that on September 13, 1990, I served a copy of the accompanying *Petition for Writ of Certiorari* and *Motion for Leave to Proceed In Forma Pauperis* on all parties required to be served by placing the copies in envelopes with adequate first class postage affixed, and by depositing the envelopes, addressed as follows, in the U.S. Mail:

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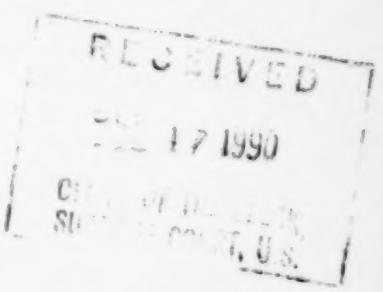

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